

6 MAY 1976

MEMORANDUM FOR: Chairman, Security Committee, United
States Intelligence Board

SUBJECT : Nondisclosure Agreement for Intelligence
Sources and Methods Information

1. The ad hoc working group of the Security Committee established by you to address the implementation of Section 7(a) of Executive Order 11905 has developed a draft Director Central Intelligence Directive as an instrument of implementation for the section of the Executive Order cited. The draft DCID No. 1/XX, "Nondisclosure Agreements for Intelligence Sources or Methods Information," a copy of which is attached, is endorsed by the Central Intelligence Agency; the wording of this Directive has also received the approval of the Federal Bureau of Investigation, National Security Agency, Department of State working group representatives. The Defense Intelligence Agency speaking for itself and the Services Intelligence components does not concur in one aspect of the proposed Directive.

2. The DIA position takes exception to the application of the document to "information containing sources or methods of intelligence" and wants the requirements of the proposed Directive to apply only to such information when it is classified under Executive Order 11652. It is understood that DIA would withdraw its nonconcurrency of the Directive if the word "classified" were inserted before the phrase "information containing sources or methods of intelligence," when this phrase occurs in the draft DCID.

3. The CIA position supported by other agencies identified above does not purport to state nor imply the existence of unclassified information containing sources or methods of intelligence, but for reasons outlined below in this memo wishes to segregate the

concepts of classification and sources and methods protection. Simply stated it identifies the object of protection as "information containing sources or methods of intelligence" and wishes to preserve alternate mechanisms for accomplishing the protection requirement, viz. the classification process and the statutory provisions of the National Security Act and the Central Intelligence Agency Act. Further, the CIA position on the proposed DCID wishes to preserve the ability for arguing these means of protection independently.

4. Neither the National Security Act of 1947 nor the Central Intelligence Agency Act of 1949 in citing the DCI responsibility for protecting intelligence sources or methods from unauthorized disclosure specifies that sources and methods information need be classified in order to warrant protection. In the opinion of counsel it is clear that this omission was not an oversight; these statutory provisions were clearly intended to provide an independent means to protect sources or methods separate from the otherwise available protection for classified information.

5. Executive Order 11905 in Section 3 directs the DCI to insure that appropriate programs are developed for the protection of intelligence sources and methods and in Section 7 addresses the protection of intelligence sources and methods from unauthorized disclosure. In neither section does the Executive Order specify that only classified sources and methods need protection. The wording of the Executive Order follows the pattern of the earlier statutes, viz. omitting reference to the classification or classifiability of the information. Separation of the concepts of classification and sources and methods protection on the basis of the Director's responsibility is important in order to support further development of the concept of the Director's responsibility and ability to execute this responsibility. It is essential that the Intelligence Community understand that the concept of source protection is not unique to the Community nor to foreign intelligence operations. It is axiomatic that police organizations and journalists can and do protect their sources from disclosure without benefit of the classification system and Executive Order 11652. The right to protect such police and journalist sources is supported in the law and has withstood repeated challenges. There are other numerous nondisclosure statutes

currently in existence covering income tax returns, harvest statistics, etc.

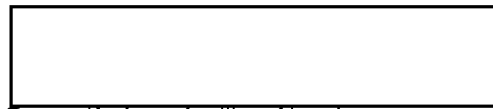
6. The Director's statutory responsibility (50 U.S.C. 403(d)(3) and 50 U.S.C. 403g) as nondisclosure statutes has now withstood court challenge in four separate cases in all of which the courts ruled that these provisions are nondisclosure statutes under the Freedom of Information Act. In none of these cases did the court determine that the information withheld must be also classified in order to qualify for the sources and methods withholding authority.

7. Under the Freedom of Information Act the burden of proof for classification rests with the government. Thus, it is incumbent upon the government to prove to the satisfaction of federal courts not only that the procedures under Executive Order 11652 have been followed, but also that the information contained in a document for which classification is claimed is indeed "classifiable" within the criteria set forth in the Executive Order.

8. The Central Intelligence Agency's position on the proposed DCID recognizes that "classifiability" pursuant to the criteria of the Executive Order is a judgement call, at times open to debate, especially by individuals not familiar with this judgement process. Executive Order 11652 recognizes this fact by its demand that classifying authority be severely limited. The CIA position would suggest that where possible we avoid the requirement of allowing a court to review this judgement when intelligence sources and methods are involved. Without suggesting any incompetence on the part of the court, we suggest that it is a great deal more difficult to prove classification than to prove that information contains intelligence sources or methods.

9. Thus, while sources and methods information requiring protection may in every case be classified, we believe it infinitely preferable to have a mechanism whereby such information can be protected to the satisfaction of the courts without having to bear the onerous burden of proving classifiability. This is partially desirable because it is often very difficult to develop an argument without convoluted logic that the disclosure of the identity

of one intelligence source or method will do damage to the national security under the criteria set forth in Executive Order 11652. The difficulty in developing such an argument at times is compounded by the Executive Order's insistence that when in doubt the lower classification or no classification option shall prevail.



Robert W. Gambino
CIA Member, USIB
Security Committee

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DCI/IC 76-3704/1
10 May 1976

MEMORANDUM FOR: Deputy to the DCI for the Intelligence
Community

FROM :
Chairman, Security Committee

STAT

SUBJECT : Proposed DCID No. 1/--, "Nondisclosure
Agreements for Intelligence Sources or
Methods Information

1. Attached is a memorandum to the Director forwarding a proposed DCID implementing Section 7(a) of Executive Order 11905, which requires that all members of the Executive Branch and its contractors given access to information containing sources or methods of intelligence sign a nondisclosure agreement.

2. There is one area of disagreement still outstanding. The Security Committee has prepared a proposed DCID following the language of the Executive Order and existing statutes, none of which refers explicitly to classified intelligence sources and methods. The DIA and the military services non-concur in this draft DCID because it does not explicitly refer to classified sources and methods.

3. It is recommended that the proposed DCID be approved without the addition of classified before sources and methods. By separating the concepts of classification from sources and methods protection, we further develop the concept of the Director's responsibility and ability to protect intelligence sources and methods.

4. It is recommended that you sign the attached memorandum to the Director.

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Attachment

DCI/IC 76-3704

MEMORANDUM FOR: Director

FROM : Daniel J. Murphy
Vice Admiral, USN
Deputy to the DCI for the Intelligence
Community

SUBJECT : Proposed DCID No. 1/--, "Nondisclosure
Agreements for Intelligence Sources or
Methods Information

1. Attached to this memorandum (Tab A) is a proposed DCID for the implementation of Executive Order 11905, Section 7(a) requiring nondisclosure agreements for intelligence sources or methods information. This Executive Order requires that this section be implemented by 18 May 1976.

2. The Security Committee has reached a consensus on the minimum requirements for this secrecy agreement, but cannot agree to the scope of material to be covered by such an agreement.

3. The DIA does not support this proposed DCID, but would withdraw their non-concurrence if the word "classified" were inserted before the phrase "information containing sources or methods of intelligence." The military services support the DIA position. The Acting Director of DIA in his position paper (Tab B) states that DoD has no unclassified sources and methods which require protection by means of a secrecy agreement.

4. The CIA position (Tab C), supported by NSA, State and the FBI, does not purport to state nor imply the existence of unclassified information containing sources or methods of intelligence, but wishes to segregate the concepts of classification and sources and methods protection. This would preserve alternate

mechanisms for accomplishing the protection requirement, viz. the classification process and the statutory provisions of the National Security Act and the CIA Act. Further, the CIA position preserves the ability for arguing these means of protection independently.

5. Neither of these two Acts, in citing the DCI responsibility for protecting intelligence sources or methods from unauthorized disclosure, specifies that sources and methods information need be classified in order to warrant protection. Neither Section 3 nor Section 7 of Executive Order 11905 specifies that only classified sources and methods need protection. The wording of the Executive Order follows the pattern of the earlier statutes in omitting reference to the classification or classifiability of the information. The proposed legislation submitted with E.O. 11905 defines the term "information relating to intelligence sources and methods" as any information classified pursuant to the provisions of a statute or an Executive Order, or a regulation or rule.

6. There are two possible courses of action:

(a) Place the issue on an NFIB agenda for discussion, or

(b) Approve the attached DCID under your authority for the implementation of Executive Order 11905.

7. I recommend that you approve the attached DCID. The CIA and DIA positions are such that discussion in an NFIB meeting would be unproductive.

Daniel J. Murphy

Attachments (3)

APPROVE:

_____ (a) _____ (b)

George Bush

Date